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The Outer Limit of the Treaty Free Movement Provisions: Some Reflections on the Significance of *Keck*, Remoteness and *Deliège*

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I Introduction

In writing a piece on the outer boundaries of the free movement provisions, it is inevitable to be forced to revisit very familiar concepts and case law. This investigation has led to findings that the present author had not anticipated: naively, one could have thought that the outer boundaries of the free movement of goods were a settled affair with the exception of the relationship between the doctrine of 'effect too uncertain and indirect' and the *Keck* selling arrangements. After all, the *Keck* ruling,[1] for all its faults, helped both commentators and national courts to determine when a rule would fall within Article 28 EC: a product requirement is always caught while rules regulating the modalities of sale would in principle, and lacking discrimination, fall outside the scope of that provision. And yet, as noted by

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[1] Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

Koutrakos,[2] as different situations presented themselves, the Court was forced to 'fine-tune' its approach and more rules have been brought back within the reach of Article 28 EC. On closer scrutiny, this fine-tuning might lead to the conclusion that the effect of the *Keck* ruling has been more limited and less revolutionary than anticipated, and consequently the boundaries of the free movement of goods less defined than one might have thought.

On the other hand, one could have thought that the definition of the outer boundaries of the free movement of persons provisions might be more difficult: it is sufficient to recall the *Carpenter* ruling as a reminder of the breadth of these provisions.[3] And yet, exactly because no attempt has so far been made to explicitly exclude a given type of rules from the scope of these provisions, the case law on the free movement of persons appears more internally consistent (which of course does not mean that is not hermeneutically problematic). Thus, almost all rules are caught by the free movement of persons provisions and once we accept the 'discouragement' test as a starting point this should not come as a surprise. There are only a handful of cases in which the Court excluded the relevance of the Treaty in cases concerning the free movement of persons and, by and large, in those cases the claimants were pushing the dicta of the Court beyond reasonable limits. This said, the discouragement test seems to find its physiological limits in relation to tax rules. Higher taxation in another Member State might clearly deter an economic operator from exercising its Treaty rights; and yet, the Court has so far (rightly) resisted the temptation to subject

[2] P Koutrakos, 'On Groceries, Alcohol and Olive Oil: More on the Free Movement of Goods after *Keck*' (2001) 26 *EL Rev* 391.

[3] Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

the level of taxation to the proportionality assessment required once a rule is found to fall within the scope of the Treaty free movement provisions.

This contribution will analyse these issues; it will start by introducing the reader to alternative conceptual backgrounds to the *Keck* ruling. It will then turn to a scrutiny of the doctrine of 'effect too uncertain and indirect'; and the case law on selling arrangements. In this respect, it will highlight how the 'refinement' of the Court's approach might signal a change in the very nature of the *Keck* presumption. It will then conclude with a brief analysis of the free movement of persons provisions, focusing on the different approach adopted in relation to tax rules.

II Redefining the Boundaries after *Keck*: Policy Decision or Coherent Hermeneutic Choice?

The *Keck* settlement hardly needs repeating: faced with increasing criticism as well as the prospect of an unmanageable case load,[4] the Court decided to exclude, as a matter of principle, some rules from the scope of the Treaty unless such rules were found to be directly or indirectly discriminatory.[5] As a result, following the *Keck* ruling the test for assessing whether a non-directly discriminatory rule is to be defined as a measure

[4] For example, AG Van Gerven's Opinion, Case C-145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR I-3851; EL White, 'In Search of the Limits to Article 30 of the EEC Treaty'(1989) 26 *CML Rev* 235; K Mortelmans, 'Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition?' (1991) 28 *CML Rev* 115.

[5] *Keck and Mithouard*(n 1).

having equivalent effect,[6] and therefore needs to be justified, seems to be—for practical purposes—tripartite.

First, product requirements always fall within the scope of Article 28 EC, without there being any need to prove discrimination or a specific effect on intra-Community trade.[7]

Secondly, selling arrangements fall within the scope of Article 28 EC only insofar as they are directly or indirectly discriminatory,[8] and possibly in the case in which they prevent access to the market of imported goods.[9]

Thirdly, residual rules, that is those rules which are neither product requirements nor *Keck* selling arrangements (such as for instance bans on sale or use;[10] inspections;[11] registration[12] and authorisation requirements;[13] licence

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[6] Of course quantitative restrictions (as well as discriminatory measure) always fall within the scope of Art 28 EC.

[7] *Keck and Mithouard* (n 1), para 15.

[8] *Ibid*, para 16.

[9] Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)*[2001] ECR I-1795.

[10] Case C-293/94 *Criminal proceedings against Brandsma* [1996] ECR I-3159; Case C-400/96 *J Harpegnies* [1998] ECR I-5121; Case C-473/98 *Kemikalienspektionen v Toolex Alpha AB* [2000] ECR I-5681.

[11] Case C-105/94 *Ditta A Celestini* [1997] ECR I-2971.

[12] Case C-55/99 *Commission v France* [2000] (Registration for reagents) ECR I-1149; Case C-390/99 *Canal Satélite Digital SL v Administracíon General del Estado*, [2002] ECR I-607, where the Court excluded that the *Keck* ruling could apply because of 'the need in certain cases to adapt the products in question to the rules in force in the Member State in which they are marketed' (para 30); to the same effect also Case C-14/02 *ATRAL SA V Belgium* [2003] ECR I-4431.

[13] Case C-120/95 *N Decker v Caisse de Maladie des Employés Privés* [1998] ECR I-1831.

requirements;[14] restrictions on transport;[15] and obligations to provide data for statistics[16]) fall within the scope of Article 28 EC if they affect directly or indirectly, actually or potentially intra-Community trade pursuant to the *Dassonville* formula.[17] However, this will not be the case when the effect of the rule on intra-Community trade is too uncertain and indirect to trigger Article 28 EC.[18]

The landscape of the free movement of goods, and in particular of what exactly is to be considered a measure having equivalent effect to a restriction on imports, is therefore still varied even after the *Keck* ruling. In this respect, while the ruling has introduced a very useful system of presumptions to assess the need for justification of domestic rules (product requirements always fall in, selling arrangements mostly not, and for other rules it depends), it has not done much to clarify the outer boundaries of Article 28 EC, and the rationale underlying the case law.

More specifically, in relation to 'certain selling arrangements', the reasoning in *Keck* carries a presumption that, at first, seemed not rebuttable: such rules are not

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[14] Case C-189/95 *Criminal proceedings against H Franzén* [1997] ECR I-5909; it is not clear whether an obligation to store semen in authorised centres is a selling arrangements or not, *cf* Case C-323/93 *Société Civile Agricole du Centre d'Insémination de la Crespelle v Coopérative d'Elevage et d'Insémination Artificielle du Département de la Mayenne* [1994] ECR I-5077, where the Court unusually refers to Case C-169/91 *Council of the City of Stoke-on-Trent and Norwich City Council v B & Q plc* [1992] ECR I-6635 (one of the *Sunday trading* cases) rather than to *Keck*.

[15] Case C-350/97 *W Monsees v Unabhängiger Verwaltungssenat für Kärnten* [1999] ECR I-2921.

[16] Case C-114/96 *René Kieffer and Roman Thill* [1997] ECR I-3629.

[17] Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 83, para 5 (hereinafter the Dassonville formula).

[18] For example, Case C-69/88 *H Krantz GmbH & Co v Ontvanger der Directe Belastingen* [1990] ECR I-583; see Section III below.

as such capable of either preventing access to the market, or of having an effect on market access different from the impact that such rules would have on access to the market of domestic products.[19] However, the exact significance of this legal presumption introduced by the *Keck* ruling is still unclear. This is all the more so given the existence of the doctrine of 'effect too uncertain and indirect', which also excludes some rules from the scope of Article 28 EC. While this doctrine preceded the *Keck* ruling, and indeed could be seen as the first attempt by the Court to exclude the application of Article 28 EC in certain cases, its survival after *Keck* begs the question as to its relationship with the latter.

In particular, it is unclear whether the presumption that non-discriminatory selling arrangements fall outside the scope of Article 28 EC is aimed at *excluding* rules that would otherwise be capable of affecting actually or potentially, directly or indirectly, intra-Community trade; or rather, whether such rules are excluded because they are *not*, as such, capable of *affecting intra-Community trade*, which is to say that their effect on intra-Community trade is uncertain and indirect if existing at all.[20]

Here, the *Keck* ruling can be interpreted in both ways depending on what one considers to be the scope of application of the Treaty. Thus, those who were unsatisfied by the compromise reached by the Court argued that the focus on the type of rule, rather than on its effect, disregarded the fact that some selling arrangements

[19] *Keck and Mithouard*(n 1) para 17.

[20] In which case para 17 of the *Keck* ruling would be nothing more than an explanation—such rules fall outside the scope of Art 28 EC because they do not prevent market access or impede it more than they impede access to the market of domestic goods.

could have an effect on intra-Community trade regardless of discrimination.[21] This was argued to be the case especially in relation to some forms of advertising and long-distance selling techniques.[22] In the view of these authors, the a priori exclusion of such rules runs contrary to the aim of Article 28 EC, and to the spirit of the *Dassonille* formula. Viewed in this light then, the *Keck* ruling would have introduced nothing more than a legal presumption,[23] so that *Keck* should be considered nothing more than a policy decision concerning the best level at which regulation should be enacted, a *sui generis* application by the Court of the principle of subsidiarity.[24]

On the other hand, those who welcomed the *Keck* ruling did so in the belief that the aim of the Treaty free movement provisions was merely to prohibit discrimination on grounds of nationality[25] or, in a broader reading,[26] true barriers to

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[21] For example, AG Jacobs' Opinion in Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179; L Gormley, 'Reasoning Renounced? The Remarkable Judgement in *Keck & Mithouard*' (1994) 5 *European Business Law Review* 63–67, and 'Two Years after Keck' (1996) 19 *Fordham Intlional Law Journal* 866; N Reich, 'The "November Revolution" if the European Court of Justice: *Keck*, *Meng* and *Audi* Revisited' (1994) 31 *CML Rev* 459; D Chalmers, 'Repackaging the Internal Market—The ramifications of the *Keck* judgment' (1994) 19 *EL Rev* 385; S Weatherill, 'After *Keck*: some thoughts on how to clarify the clarification' (1996) 33 *CML Rev* 885; I Higgins, 'The Free and Not so Free Movement of Goods since *Keck*' (1997) 6 *Irish Journal of European Law* 166; C Barnard, 'Fitting the remaining pieces into the goods and persons jigsaw?' (2001) 26 *EL Rev* 35.

[22] See especially AG Jacobs' Opinion in *Leclerc-Siplec ibid*.

[23] See to this effect the Opinion of Advocate General Fennelly in Case C-190/98 *V Graf v Filzmoser Maschinenbau GmbH* [2000] ECR I-493, para 19.

[24] See also AG Tizzano's Opinion in Case C-442/02 *Caixa-Bank* [2004] ECR I-8961, especially paras 59 and ff on the relationship between the allocation of competences in the EC Treaty and the interpretation of the primary free movement provisions; and G Davies, 'Can Selling Arrangements Be Harmonised?' (2005) 30 *EL Rev* 371.

[25] For example, N Bernard, *Multi Level Governance in the European Union* (London, Kluwer Law International, 2002); and J Snell, *Goods and Services in EC Law* (Oxford, Oxford University Press, 2002).

intra-Community movement/trade. Interpreted in this way, the Treaty should have no effect on the regulatory autonomy of the Member States, or their ability to decide upon the correct level of market regulation. The only limitation clearly and expressly imposed by the Treaty concerned the need to afford equal treatment to out-of-State economic operators (or not to raise unjustified barriers to intra-Community movement/trade). In this interpretation then, the *Keck* ruling simply rectified the wrong turn taken by the Court during the Sunday trading saga, when rules which did not have discriminatory effects (or any effect at all on intra-Community trade), were brought within the scope of Article 28 EC. Seen in this light, *Keck* would not introduce any presumption; rather, it simply clarifies that, lacking discrimination, certain rules are not per se capable of preventing market access or affect it more than they affect market access for domestic goods. Certain selling arrangements are excluded from the scope of the Treaty not because of a policy decision of sorts, but simply because they do not have an effect on intra-Community trade. As a result, the rationale behind the *Keck* ruling would be the same as the rationale behind the doctrine of 'effect too uncertain and indirect': in both cases the Treaty does not apply because there is no effect on the free movement of goods.

As we shall see in the next sections, both explanations of the *Keck* ruling reflect, at different times, the Court's case law. Thus, it will be argued that in the aftermath of the ruling, the almost mechanical application of the *Keck* presumption might lead to the conclusion that it was best qualified as a policy decision, thus lending support to those who criticised the Court for its lack of hermeneutic

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[26] See also AG Poiares Maduro's Opinion in Case C-158/04 *Alfa Vita Vassilopoulos* [2006] ECR I-8135.

consistency. However, in more recent years, following a fine-tuning in the approach to both discrimination and what is to be considered a certain selling arrangement,[27] the nature of the *Keck* ruling might have evolved, so that the focus has shifted back to ascertaining whether the rules under scrutiny affect intra-Community trade.

Before turning to the analysis of the *Keck* case law it is useful to examine the scope of the doctrine of 'effect too uncertain and indirect' since the question as to the rationale underpinning the exclusion of certain selling arrangements from the scope of Article 28 EC is closely linked to the exclusion of certain rules because of the lack of effect on intra-Community trade.

III The Doctrine of 'Effect too Uncertain and Indirect'

As mentioned above, the doctrine of 'effect too uncertain and indirect' was first formulated by the Court during the Sunday trading saga, and might be seen as a tentative attempt to curtail the breadth of the *Dassonville* formula. In *Krantz*,[28] to the author's knowledge the first case in which the doctrine was mentioned, the Court examined the compatibility with Article 28 EC of rules which granted tax authorities the power to seize moveable property from the premises of companies in order to recover tax debt. In analysing the issue, Advocate General Darmon argued that *Torfaen* (the first of the *Sunday trading* cases)[29] indicated the presence of a *lower limit* before a measure having equivalent effect on imports could become discernible.

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[27] See also Koutrakos, (n 2)391.

[28] *H Krantz GmbH & Co v Ontvanger der Directe Belastingen* (n 18).

[29] Case C-145/88 *Torfaen Borough Council v B & Q plc* [1989] ECR I-3851.

Thus, in his opinion, 'the restrictive effects on imports, if inherent in legislation pursuing goals permitted by the Treaty, cannot, unless they are disproportionate, cause a measure to be regarded as a measure having equivalent effect to quantitative restrictions'.[30] He then found that the rule in question in *Krantz* fell short of that lower limit since its effect on imports could not be substantiated.

The Court followed a slightly different path to reach the same conclusion. It first found that the rules in question applied without distinction and did not seek to control intra-Community trade. It then added:

> *Furthermore*, the possibility that nationals of other Member-States would hesitate to sell goods on instalment terms to purchasers in the Member-State concerned because such goods would be liable to seizure by the collector of taxes if the purchasers failed to discharge their Dutch tax debts is *too uncertain and indirect* to warrant the conclusion that a national provision authorising such seizure is liable to hinder trade between Member-States. (para 11, emphasis added)

Such an approach was repeated in *Baskiciogullari*,[31] where the Court held that a German rule which imposed a duty to provide information on the parties to a contract fell outside the scope of Article 28 EC since its effect was too uncertain and indirect to be liable to hinder trade.

As said above, both cases were decided during the Sunday trading saga; in this respect, Advocate General Tesauro's opinion in *Hünnermund*[32] (the opinion on which

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[30] *H Krantz GmbH & Co v Ontvanger der Directe Belastingen* [(n 18), Opinion para 16.

[31] Case C-93/92 *Baskiciogullari* [1993] ECR I-5009; here AG Van Gerwen found that the rule fell outside the scope of Art 28 without reference to the effect too uncertain and indirect doctrine.

[32] Case C-292/92 *R Hünermund and others v Landesapothekerkammer Baden-Wurttemberg* [1993] ECR I-6787.

the Court based the *Keck* ruling) is interesting since it discusses, however briefly, these two cases in illustrating the confusion, and lack of coherent approach, that had characterised the Court's interpretation of the free movement of goods since the mid-1980s. In proposing what will effectively become the *Keck* test, Mr Tesauro clearly intended to replace the different approaches discernible in the case law with a single (and coherent) test. This notwithstanding, the test suggested by Mr Tesauro focused on the specific measure under consideration—a ban on advertising outside pharmacies—so that, even though Mr Tesauro's reasoning was overall of general application, the test he proposed was not. Viewed in this light, then, it is not altogether surprising that the doctrine of 'effect too uncertain and indirect' survived the *Keck* ruling.[33]

In subsequent case law, the doctrine of 'effect too uncertain and indirect' has been refined. In *Peralta*,[34] the Court suggested that for a rule to fall outside the scope of Article 28 EC, three conditions need to be met: first of all, absence of discrimination; secondly, the rule should not be intended to regulate trade; and thirdly, the restrictive effects that the rule might have must be too uncertain and indirect to

[33] More recently, Advocate General Kokott fell short of suggesting that the doctrine of effect too uncertain and indirect be disposed of because of the difficulties inherent in its application, and that other rules be brought within the *Keck* presumption, Opinion in Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos*, delivered 14 December 2006, case still pending at the time of writing, para 46.

[34] Case C-379/92 *Peralta* [1994] ECR I-3453, para 24; see also Joined Cases C-140 to 142/94 *DIP v Comune di Bassano del Grappa* [1995] ECR I-3257; Case C-96/94 *Centro Servizi Spediporto v Spedizioni Maritima del Golfo Srl* [1995] ECRI-2883; Case C-266/96 *Corsica Ferries France v Gruppo Antichi Ormeggiatori del Porto di Genova and others* [1998] ECR I-3949.

hinder trade between Member States. *Peralta*, albeit not always applied consistently,[35] therefore indicates that the doctrine and the *Keck* exception can be distinguished since the latter applies to non-discriminatory measures which are intended to regulate trade (although not specifically intra-Community trade); whilst the former applies to non-discriminatory measures which do not regulate trade,[36] albeit they might have some very remote effect on it.[37] And in a way, the fact that the doctrine of 'effect too uncertain and indirect' applies only to non-trading rules is entirely in harmony with the *Dassonville* formula that refers to 'trading rules' which actually or potentially restrict intra-Community trade. We shall come back to this point further below.

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[35] See also obiter in Case C-254/98 *TK-Heimdienst* [2000] ECR I-151; however, in Case C-231/03 *Coname* [2005] ECR I-7287, para 20, the Court seems to suggest that a direct award without invitation to tender, considered indirectly discriminatory for lack of transparency, might fall outside the scope if the contract in question would be so modest so that it 'could be reasonably maintained' that out-of-State undertakings would not have an interest, and therefore the effect of the lack of tender procedure would be too uncertain and indirect on the Treaty free movement provisions. It is unclear whether this obiter indicates that rules which might be qualified as indirectly discriminatory might be excluded from the scope of the Treaty pursuant to the uncertain effect doctrine; or whether the negligible economic value of the transaction might altogether exclude discrimination. The latter would be a more coherent approach. A similar confusion is discernible in Case C-20/03 *Burmanjer* [2005] ECR I-4133.

[36] But see *Burmanjeribid*, in which the Court seems to suggest that the doctrine of effect too uncertain and indirect might apply also to trading rules.

[37] See also Opinion of AG Fenelly in Case C67/97 *D Bluhme* [1998] ECR I-8033, especially paras 20 and 21 where he considers separately the uncertain effect doctrine, and the *Keck* exception thus also suggesting a different scope of application for the two; and similarly the ECJ's ruling paras 21 and 22 in Case C-134/94 *Esso Española* [1995] ECR I-4223, in relation to rules which imposed upon petroleum traders a duty to supply at least four of the Canary islands; in Case C-44/08 *BASF* [1999] ECR I-6269, the Court, much as it did in *V Graf v Filzmoser Maschinenbau GmbH*(n 23), held that when the effect of a rule depends also on the unforeseeable decisions of economic operators, then the rule's effect is too uncertain and indirect to be considered an obstacle falling within Art 28 EC.

The ruling in *Semeraro Casa Uno*,[38] seems to support the fact that the 'effect too uncertain and indirect' doctrine applies only to non-trading rules. The case concerned Sunday trading rules and whether they were compatible with both the free movement of goods and the freedom of establishment. The Court found that the rules fell outside the scope of Article 28 EC pursuant to the *Keck* ruling; and that they fell outside the scope of Article 43 EC since they were non-discriminatory; they were not intended to regulate the conditions for establishment; and their effect was too uncertain and indirect to affect the freedom of establishment. The different approach adopted to scrutinise the same rules signals therefore that selling arrangements and rules the effect of which is too uncertain and indirect are conceptually distinct.

In particular, and as explained by Advocate General La Pergola in *BASF*,[39] in the latter case there is no causal link between rule and alleged restriction and for this reason the *Dassonville* formula, or the other free movement provisions, cannot apply. On the other hand, in relation to selling arrangements there might be an effect on intra-Community trade (for instance the reduction of the total volume of sales) and yet this effect is not relevant for the application of Article 28 EC.

The fact that the doctrine of 'effect too uncertain and indirect' relates (exclusively) to non-trading rules might be further demonstrated by its use in relation to Article 29 EC.[40] As it is well known, the scope of application of Article 29 EC is much narrower than the scope of Article 28 EC since it is limited to a prohibition of

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[38] Joined Cases C-418/93 and others *Semeraro Casa Uno Srl v Sindaco del Comune di Ebrusco* [1996] ECR I-2975.

[39] Opinion Case C-44/08 *BASF* [1999] ECR I-6269, para 18.

[40] Cf, eg Case C-412/97 *ED Srl v I Fenocchio* [1999] ECR I-3845.

measures that restrict patterns of exports by establishing a difference between internal and external trade to the advantage of the former.[41] And yet, the doctrine of 'effect too uncertain and indirect' has found its way in the assessment of alleged restrictions to exports. This is rather surprising since, should the rule be directly discriminatory and advantage domestic trade, then it would fall within the scope of Article 29 EC; but if it is not, by definition it does not fall within the scope of that provision and any reference to the doctrine of 'effect too uncertain and indirect' seems redundant. The fact that the Court still refers to the doctrine of 'effect too uncertain and indirect' then seems to confirm that it is a tool to exclude the application of the free movement provisions in relation to rules which do not regulate trade. It is in relation to those rules that the claimant will need to demonstrate the existence of a causal relationship between rule and alleged barrier; in relation to trading rules, however, the analysis will be exclusively focused on the existence of a barrier (however defined) since causation is taken for granted. Once the barrier is found to exist, there is no need for an investigation as to a causal relationship between that barrier and the situation at issue in the case under investigation.[42] Here, one way to look at this difference would be to refer back to the *Dassonville* formula mentioned earlier: when assessing the compatibility of trading rules with Article 28 EC the causal connection is taken for granted because even potential barriers to intra-Community trade are caught. The

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[41] Case 237/82 *J Kaas BV et al. V Dutch Government Central Organ Zuivelkontrole* [1984] ECR 483, para 22; more recently see Case C-12/02 *Grilli* [2003] ECR I-11585, especially para 42 in relation to the difference between the scope of Art 28 EC and Art 29 EC.

[42] In this respect see, eg Case C-317/92 *Commission v Germany* (Expiry dates) [1994] ECR I-2039 where the Court dismissed as irrelevant the German Government's contention that rules restricting the expiry dates of certain products to two a year should not fall within the scope of Art 28 EC since the trader was in any event obliged to alter the packaging in order for the information to be given in German.

same however does not appear to be true in relation to non-trading rules: whilst a potential effect might be sufficient (there is no authority either way), it still needs to be proven.

IV Back to *Dassonville*?

The Case Law Certain Selling Arrangements

From the cursory analysis carried out above, it seems that the doctrine of 'effect too uncertain and indirect' and the *Keck* a priori exclusion of some non-discriminatory rules from the scope of Article 28 EC can be kept distinct. Whilst both are tools to exclude the application of Article 28 EC, the former applies to *non-trading* rules which have no causal connection with the alleged barrier; whilst the latter applies to non-discriminatory *trading* rules of a certain type. The significance of this difference will then depend on whether certain selling arrangements are trading rules which lack a sufficient causal connection with the alleged barrier to intra-Community trade; or whether such rules are excluded because of a priori decision as to the appropriate level at which regulation should be enacted (or in certain instances because of an a priori decision as to the merit of the legislation in question). In the former case, the only difference between the doctrine of effect 'too uncertain and indirect' and *Keck* would rest on the type of rule to which the respective doctrines are applied and the two doctrines could be easily merged into one test (albeit they still might be kept separate for ease of convenience). However, if selling arrangements are excluded

because of an a priori decision, then the difference between the *Keck* and the *Peralta* doctrine would be of a more substantive nature, in that *Keck* would relate to rules which affect intra-Community trade but are nonetheless excluded from the scope of Article 28 EC, whilst the *Peralta*-type rules would be excluded simply because they do not have an effect on intra-Community trade.

It is therefore necessary to consider the case law on selling arrangements and in particular the extent to which rules regulating the modalities of sales are in practice excluded from the scope of the Treaty. In this respect, we can identify three trends in the case law: first, those cases in which the Court applies almost mechanically the *Keck* formula; secondly, those in which discrimination is used as a flexible tool that can be bent to include selling arrangements without there being the need for the trader to support with any evidence the existence of factual discrimination;[43] thirdly, those cases in which the dividing line between rules which fall within the scope of the *Keck* exception and rules which fall within the standard *Dassonville* formula is not entirely clear.

A The Mechanical Application of the *Keck* Formula

The first line of cases is predominant in the years immediately following the *Keck* judgment. In those cases, the Court applied the *Keck* ruling to exclude, for instance,

[43] See Koutrakos, (n 2) 391; also L Prete, 'Of Motorcycles Trailers and Personal Watercrafts: the Battle over *Keck*' (2008) 35 *Legal Issues of Economic Integration* 133.

Sunday trading rules and rules concerning opening hours;[44] rules concerning where and how a product can be sold;[45] and some rules concerning advertisement.[46] Those cases are fairly straightforward: the application of the *Keck* formula is almost mechanical; the assessment of discrimination is purely abstract, if existing at all,[47] and the burden of proof as to the existence of factual discrimination seems to lie with the claimant.[48] Overall, the outcome in these cases is entirely predictable. The lack of any grounded assessment of the effect of the rules at issue on intra-Community trade thus might lend support to the view that, at least at first, the *Keck* ruling was better seen as a policy decision so that certain rules never fell within the scope of Article 28 EC simply because the Court so decided.

B The More Flexible Approach to Discrimination

Less predictable is the second line of cases, where the broad interpretation of the notion of indirect discrimination allows the Court to scrutinise the justification and

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[44] Case C-401/92 *Tankstation* [1994] ECR I-2199; Case C-69/93 *Punto Casa Spa* [1994] ECR I-2395; *Semeraro Casa Uno Srl v Sindaco del Comune di Ebrusco* and others(n 38).

[45] Case C-391/92 *Commission v Greece* (milk for infants) [1995] ECR I-1621; Case C-387/93 *Banchero* [1995] ECR I-4663; Case C-63/94 *Belgapom* [1995] ECR I-2467; *Burmanjer* (n 35); Case C-441/04 *A-Punkt Schmuckhandel* [2006] ECR I-2093.

[46] *R Hünermund and others v Landesapothekerkammer Baden-Wurttemberg* [1993](n 32); *Leclerc-Siplec*(n 21); and, although rather confusing as a ruling, Case C-34/95 *De Agostini* [1997] ECR I-3843; and Case C-71/02 *Karner* [2004] ECR I-3025.

[47] For example Case C-63/94 *Belgapom* [1995] ECR I-2467; *Leclerc-Siplec* (*ibid*)

[48] Case C-34/95 *De Agostini* [1997] ECR I-3843.

proportionality of the rules under consideration. Measures which have been found to be indirectly discriminatory include: rules restricting door-to-door sales and sales on rounds of grocery products to traders having an establishment within the district or a bordering district of the place where the sale would be carried out (*TK-Heimdienst*);[49] rules prohibiting advertising of alcoholic beverages (*Gourmet*);[50] rules on the packaging of bake-off products (*Morellato*);[51] and rules on a prohibition of internet sales of medicinal products (*DocMorris*).[52]

In these cases the assessment of discrimination seems not always to be based on much hard factual evidence. Rather, very much as it happens with the assessment of discrimination in the case of obstacles to the free movement of persons,[53] it is based on assumptions as to the *likely* effect of the rules under consideration. Such assumptions, however, do not always stand a rigorous scrutiny.[54] Take for instance *TK-Heimdienst*.[55] In that case Advocate General La Pergola found that it was very unlikely that the rules concerning the sale on rounds of grocery products would have an effect on intra-Community trade since there is a 'natural limit' to the areas covered by that form of grocery distribution. On the other hand, the Court relied on purely

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[49] Case C-254/98 *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdiest Sass GmbH* [2000] ECR I-2487.

[50] *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)* (n 9).

[51] Case C-416/00 *T Morellato v Comune di Padova* (No 2) [2003] ECR I-9343.

[52] Case C-322/01 *Deutscher Apothekerverband eV, 0800 DocMorris NV, Jacque Waterval* [2004] ECR I-4887.

[53] For example C-237/94 *O'Flynn v Adjudication Officer* [1996] ECR I-2617.

[54] See also D Wilsher, 'Does *Keck* discrimination make any sense? An assessment of the non-discrimination principle in the European Single Market' (2008) 33 *EL Rev* 3.

[55] *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdiest Sass GmbH* (n 49).

theoretical reasoning to find that the rules were indirectly discriminatory, therefore relieving the traders from the need to prove any existence of factual discrimination.

Or consider the ruling in *Morellato*.[56] There the issue related to packaging and labelling requirements for bake-off products, that is bakery products which are pre-prepared and undergo only the final stage of baking in the premises where they are sold. The Court found that the rules at issue were not product requirements since they did not entail the need to modify the imported product. Since the rules related to the marketing stage they were to be considered as selling arrangements. The Court then held that there was unjustified factual discrimination. It based its finding on the fact that, since such products were not manufactured in Italy, the rules disadvantaged imported products only, in that they discouraged their imports *or* made the products less attractive to consumers. This broad interpretation of discrimination is at odds with established case law in relation to discriminatory taxation, where the Court has held that when there is no domestic production of goods similar to or in competition with the imported product there cannot be any discrimination;[57] as well as with the Court's own finding in the *milk for infants* case.[58] In the latter case, the Commission brought proceedings against Greece in relation to rules which restricted the possibility to sell processed milk for infants to pharmacies. The Court held that the fact that Greece did not produce the goods in question was not relevant in the assessment of discrimination since the applicability of Article 28 EC:

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[56] *T Morellato v Comune di Padova* (No 2) (n 51).

[57] Case C-47/88 *Commission v Denmark* (registration duty for cars) [1990] ECR I-4509.

[58] *Commission v Greece* (n 45).

> cannot depend on such a purely fortuitous factual circumstance, which may, moreover, change with the passage of time. If it did, this would have the *illogical* consequence that the same legislation would fall under Article 30 [now 28] in certain Member States but fall outside the scope of that provision in other Member States (para 17, emphasis added).

Whilst it might be argued that the Italian rules in *Morellato* might have had some protectionist effect in that they placed Italian in-store baked bread at an advantage, there is no indication in the ruling that that was the rationale underpinning the Court's reasoning.

Similarly, in *Gourmet* there is little discussion of discrimination: it might be recalled that the rules at issue prohibited the advertising of alcoholic products.[59] In particular, the Swedish Government had submitted evidence to the effect that the sale of whisky and wine, mainly imported, had grown in comparison with the sale of vodka, mainly home-produced. The Court dismissed the evidence by holding that it could not be precluded that in the absence of the legislation at issue the switch in consumers' preferences would have been greater[60] (a *probatio diabolica* if ever there was one).[61] While, again, it could be argued that a prohibition on advertising affects intra-Community trade regardless of discrimination (but then *Keck* should not apply to such rules), the reasoning of the Court, or part thereof, seems more driven by the desire that the rules at issue would be subject to justification, than by a grounded assessment of discrimination.

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[59] *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)*(n 9).

[60] Para 22.

[61] *Cf* AG Tesauro's Opinion in Case C-292/92 *Hünermund and Others v Landesapothekerkammer Baden-Württemberg* [1993] ECR I-6787 where he talks about 'probatio diabolica' in relation to a *de minimis* test (para 21). In *Gourmet* the Court also referred to the fact that the evidence did not relate to beer.

Even leaving aside the above considerations, the Court's approach to discrimination is not always consistent. Contrast, for instance, *TK-Heimdienst* and *DocMorris*, on the one hand, with *Burmanjer* and *A-Punkt*, on the other. As said above, *TK-Heimdienst* related to rules restricting door-to-door and sales on rounds of groceries to traders having an establishment within the district or a bordering district from where the sale on rounds was to take place;[62] and *DocMorris* concerned rules that prohibited the internet sale of medicinal products.[63] In both cases the Court found the rules to be indirectly discriminatory: in *TK-Heimdienst*, because of the fact that an establishment requirement is always discriminatory, regardless of the fact that it was very unlikely that out-of-State traders established in places not bordering with Austria would have any interest in travelling hundred of miles to sell their groceries door-to-door. And in *DocMorris*, the rules were found to be discriminatory since:

> for pharmacies not established in Germany, the internet provides a more significant way to gain direct access to the German market. A prohibition which has a greater impact on pharmacies established outside German territory could impede access to the market for products from other Member States more than it impedes access for domestic products (para 74).

On the other hand, in *Burmanjer* a prior authorisation requirement for the itinerant sale of periodicals was found not to be indirectly discriminatory;[64] and in *A-Punkt* the same conclusion was reached in relation to rules prohibiting door-to-door sales of

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[62] *Schutzverband gegen unlauteren Wettbewerb v TK-Heimdiest Sass GmbH* (n 49).

[63] *Deutscher Apothekerverband eV, 0800 DocMorris NV, Jacque Waterval* (n 52).

[64] *Burmanjer* (n 35).

jewellery.[65] If the rationale in *TK-Heimdienst* and *DocMorris* was that the rules were indirectly discriminatory because they placed traders having an establishment in the national territory at an advantage compared to out-of-State traders who are less likely to have already established a presence in the host-State, then such a rationale should have applied a fortiori in the case of *Burmanjer* and *A-Punkt*. In the latter, small economic operators were prevented from effectively broadening their market without incurring significant costs;[66] even though the Court left the assessment as to the existence of discrimination to the national court, it seemed doubtful as to its existence. In *Burmanjer*, the Court dismissed as 'unproven' the submission that rules on itinerant sales of periodicals might affect foreign periodicals more than domestic ones, to then add that even if there were such an effect, it would be 'too insignificant and uncertain' to hinder trade between Member States.[67] It therefore seemed to espouse a *de minimis* approach which fits uncomfortably with its own case law.[68]

Overall, those cases point at a flexible use of factual discrimination, so that certain rules are declared to be indirectly discriminatory regardless of any concrete evidence as to their disparate effect on imported goods. Furthermore, a rigorous approach to discrimination should entail a discussion of the appropriate comparator (existing trader or new market entrant?), which is generally lacking in the Court's jurisprudence on selling arrangements. Finally, and as pointed out above, it is unclear

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[65] Case C-441/04 *A-Punkt Schmuckhandel* [2006] ECR I-2093.

[66] See also Commission's submissions as reported in para 22 of the ruling.

[67] *Burmanjer*(n 35) para 31.

[68] For example recently Case C-212/06 *Government of the French Community and Walloon Community v Government of the Flemish Community*, judgment of 1 April 2008, not yet reported, para 52.

why the effect of rules which are similar in kind is judged differently according to the case under consideration. This more flexible approach to discrimination might therefore suggest a considerable relaxation of the 'selling arrangement' exception, so that an increasing number of rules can be brought back within the scope of Article 28 EC and undergo the proportionality scrutiny demanded by the mandatory requirements doctrine.

C The Boundary Between Selling Arrangements and Other Rules

The third strand of case law that deserves attention is that in which the Court is called upon to assess the boundary between rules that fall within the scope of the *Keck* exception, and those which fall outside the 'certain' selling arrangements that benefit from a narrower application of Article 28 EC. In this respect, whilst rules which require the modification of the imported product can never be qualified as a selling arrangement,[69] in certain cases rules which concern the modalities of sale might be excluded from the *Keck* exception;[70] and in other cases it is more difficult to decide whether the rule does fall within the 'selling arrangement' category.

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[69] For example Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689; Case C-390/99 *Canal Satélite Digital SL v Administracíon General del Estado* [2002] ECR I-607; Case C-12/00 *Commission v Spain* (chocolate) [2003] ECR I-459.

[70] Other rules by nature do not fall within the product requirements/selling arrangements dichotomy since they do not relate either to the modalities of sale or to the physical characteristics of the products; see above, Section II.

For instance, juxtapose the case of *Banchero*, on rules which limited the sale of tobacco to authorised licensed retailers,[71] to the case of *Franzén*, on a licensing requirement for the sale of alcoholic products.[72] In the former case the rules were found to be non-discriminatory selling arrangements, whilst in the latter case the rules were found to fall outside the *Keck* exception and were therefore subject to the full force of the *Dassonville* formula. And yet, the rules at issue in the two cases both concerned a licensing requirement whereby the sale of given products was reserved to authorised retailers.

Or compare the rules at issue in the case of *Morellato* with the rules at issue in *Alfa Vita.* As we have seen, in *Morellato*, rules concerning the packaging of bake-off products were found to be selling arrangements; as a result, the Court had to rely on a broad (and not entirely consistent) finding of discrimination in order to subject the rules to the proportionality assessment.[73] On the other hand, in *Alfa Vita* rules restricting the sale of bread baked on the premises to stores which complied with all the requirements prescribed for bread-making establishments were found not to be selling arrangements since they did not take into consideration the specific nature of bake-off products; they entailed additional costs; and they made the marketing of bake-off products more difficult.[74] In this respect, there seems to be some confusion so that the assessment of the effect of the rule is relevant in determining whether the

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[71] Case C-387/93 *Banchero* [1995] ECR I-4663; see also (pre-*Keck*) C-23/89 *Quietlynn Ltd and BJ Richards v Southend Borough Council* [1990] ECR I-3059.

[72] C-189/95 *Criminal proceedings against H Franzén* [1997] ECR I-5909.

[73] *T Morellato v Comune di Padova* (No 2)(n 51).

[74] *Alfa Vita Vassilopoulos* (n 26).

rule is a certain selling arrangement. In this way, the focus shifts back from assessing the 'type' of rule, to assessing its 'effect'.

It therefore seems that far from having introduced a rigid distinction, the application of the *Keck* ruling will very much depend on the specifics of the case at issue. And yet, in order to understand why certain selling arrangements are excluded from the scope of Article 28 EC, it is important to identify the rationale behind the Court's decisions.

V Possible Explanations for the Exclusion of Certain Selling Arrangements from the Scope of Article 28 EC

The most obvious explanation for the exclusion of certain selling arrangements from the scope of Article 28 EC is that suggested by the Court in *Keck* itself. Certain rules are excluded from the scope of the Treaty because, provided they are not discriminatory, they neither prevent market access nor impede it more than they impede it for domestic goods. However, and as this might be certainly true for some cases,[75] such an explanation does not help in understanding the different approaches to discrimination, or the reason why some rules which seem similar, and which relate to the way a product can be sold, are classified sometimes as a certain selling arrangement, and sometimes not. For instance, a prohibition on door-to-door sales

[75] See especially those analysed in Section IVA above on the mechanical application of the *Keck* ruling.

such as the one at issue in *A-Punkt*, might affect the ability to access the market of out-of-State traders, who do not have an establishment in the territory, more than it affects access of domestic traders. And yet, the rules at issue were found, in principle, not to be discriminatory. On the other hand, a licensing requirement for the sale of alcoholic beverages, such as the one at issue in *Franzén*, does not have a discriminatory effect on market access (as the Court itself held in both *Franzén* and *Banchero*). And yet, the rules at issue in *Franzén* did not benefit from the *Keck* exemption. If the explanation contained in para 17 of *Keck*, according to which non-discriminatory selling arrangements fall outside the scope of Article 28 EC because they do not prevent market access or impede it more than they impede it for domestic products, were always true, then these discrepancies in the case law are difficult to justify.

For this reason, one needs to look at alternative possible explanations: the obvious one is to read *Keck* as a refinement of the *Dassonville* formula, in that it clarifies that a mere reduction in the volume of sales is not, in itself, enough to trigger Article 28 EC; and it introduces a presumption to the effect that certain rules are normally not liable to affect directly or indirectly, actually or potentially intra-Community trade. Thus, some selling arrangements do not affect intra-Community trade in that any effect they have is an effect on trade as a whole and not specifically on trade in goods that have crossed a border. However, some rules concerning selling arrangements might have a specific effect on intra-Community trade, in which case they will be subject to scrutiny by either a broad interpretation of discrimination or by the exclusion of the applicability of the *Keck* presumption. Thus, for instance, the ruling in *TK-Heimdienst* seems consistent with the fact that Community law ill-tolerates any establishment/residence requirement, even though the willingness of out-

of-State traders to engage in the commercial practice at issue might be extremely unlikely (if not altogether remote). The ruling in *DocMorris* is fully justified should one consider the effectiveness of internet sales as a means to penetrate foreign markets. The licensing requirement in *Franzén* had an effect on intra-Community trade which the rules in *Banchero* lacked because of the extremely restrictive nature of the rules on the sales of alcoholic beverages in Sweden (as was also the case in *Gourmet*) compared to the non-restrictive effect of the Italian licensing rules on tobacco.[76] The Swedish rules were aimed at discouraging consumption of alcohol; the Italian rules, on the other hand, were aimed at guaranteeing access to tobacco products throughout the national territory, including remote rural communities. Similarly, the rules in *Morellato* and *Alfa Vita* had the effect of making it excessively (and unnecessarily) difficult for a product, bake-off bread, which had traditionally not been sold in Italy and Spain, to be sold in those countries.[77]

The focus on the effect on intra-Community trade rather than on the nature of the measure would also explain why rules that might be considered similar from an ontological viewpoint, such as licensing, authorisation or equipment requirements, are de facto treated in a different way depending on the circumstances. And again it would explain the ruling in *Dynamic Medien*.[78] There, the rules at issue prohibited the sale by post of videos, movies and videogames which did not bear an age-limit label

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[76] See also Case C-438/02 *Hanner* [2005] ECR I-4551, paras 32 and ff, on the distinction between *Franzén* and *Banchero*.

[77] In this respect consider Gormley's argument that the *Sunday trading* cases were simply a misapplication of the *Dassonville* formula, in that Sunday trading rules simply did not affect intra-Community trade; see 'Recent case law on the free movement of goods: some hot potatoes' (1990) 27 *CML Rev* 825.

[78] Case C-244/06 *Dynamic Medien*, judgment of 14 February 2008, not yet reported.

corresponding to a classification decision of one of the competent bodies. Advocate General Mengozzi considered the rules to be certain selling arrangements because they concerned modalities of sale; the Court, on the other hand, in order to justify the exclusion of the *Keck* exception, focused also on the double burden that such rules would introduce in relation to those movies which had already undergone a similar scrutiny in the country of origin. However, regardless of the rules of the country of origin, it is clear that such rules affected the possibility of importing movies into Germany in that they required the goods to be subjected to the competent board to assess suitability for given age groups.

This said, the exclusion of the application of Article 28 EC in *Burmanjer* and *A-Punkt* is still puzzling and might lead to the finding that the disparate application of the *Keck* formula indicates that certain rules are to be considered as barriers to intra-Community trade only when their effect is more than minimal. And yet, the Court has so far refused to adopt a *de minimis* approach in relation to the free movement provisions.[79] Furthermore, a *de minimis* approach would fail to explain why some licensing rules have an 'appreciable' effect on trade, whilst rules that restrict consumption of a product to a certain age group would (almost certainly) not.

VI *Peralta* and *Keck* v *Peralta* or *Keck*?

[79] For example recently Case C-212/06 *Government of the French Community and Walloon Community v Government of the Flemish Community*, judgment of 1 April 2008, not yet reported, para 52.

At the beginning of this analysis we pointed out how the *Keck* ruling could be interpreted in two different ways, either as a decision aimed at excluding some rules from the scope of the Treaty for policy reasons; or, as a decision which merely rectified the mistaken interpretation given to Article 28 EC during the Sunday trading saga according to which a mere reduction in the volume of sales was enough to attract the rules within the ambit of the 'potential' restriction of intra-Community trade pursuant to the *Dassonville* ruling. The choice between the two alternative explanations is important to understand the scope of the Treaty both in order to determine the extent to which the *Keck* presumption is open to rebuttal and to assess the relationship between the remoteness doctrine and the *Keck* ruling.

In this respect, it has been argued that while at the beginning the almost mechanical application of the *Keck* ruling suggested that it was a policy decision, the fine-tuning of its application in more recent years suggests that it is simply a tool to tame the excesses inherent in the broad *Dassonville* formula. Thus, the flexible *ad hoc* approach to discrimination, together with the ease with which the Court excludes certain rules from the 'certain selling arrangements' category, suggests that *Keck* simply introduces a useful system of presumptions as to which rules are more likely to affect intra-Community trade. In this respect, the only certainty after *Keck* seems to be that Sunday trading rules fall outside the scope of Article 28 EC (much as they fall outside the scope of the other free movement provisions).

Thus *Keck*, far from introducing a rigid dichotomy where the test applied to assess the existence of a barrier to intra-Community trade depends on the type of rules at issue, simply introduces a useful and flexible system of presumptions. In this respect, if the crucial factor in the application of Article 28 EC is still the 'effect' on intra-Community trade, then there is a common rationale underlying the case law on

remoteness and the *Keck* doctrine. However, the two still differ for two reasons. First of all, the remoteness doctrine applies only to non-trading rules; secondly, it is only in the case of these rules that the claimant has to establish causation. Only if such causation exists will there be a second stage in the investigation to ascertain whether the alleged barrier is a barrier falling within the scope of Article 28 EC. On the other hand, in relation to trading rules causation is presumed exactly because they regulate *trade* and therefore the focus is exclusively on the existence of a barrier. This rather theoretical difference reflects then another presumption, this time in relation to non-trading rules. Those rules, provided they are not discriminatory, do not affect intra-Community trade unless a precise link of causation can be established.[80] An example might be of use to illustrate this point. Take for instance rules on recovery of tax debt at issue in *Krantz*: those rules did not intend to regulate trade; while they might have had a spill-over effect on the ease with which commercial debt could be recovered, in themselves they did not affect trade. For this reason, it would fall upon the claimant to prove that there is a direct link of causation between the rule at issue, and their ability to enjoy the freedom granted by the Treaty. On the other hand, in relation to trading rules the causal effect is taken for granted and therefore even a purely potential effect on intra-Community trade is sufficient to trigger Article 28 EC. As a result, the trader does not need to prove a specific effect on her situation of the rules at issue. Consider for instance those cases in which the Member State unsuccessfully argued that rules of labelling might in certain instances not have a restrictive effect because of the need

[80] In this respect see also the ruling in *V Graf v Filzmoser Maschinenbau GmbH* (n 23), and below Section VII.

for the trader to modify the label to satisfy language requirements.[81] These rules are defined as barriers because they *potentially* affect intra-Community trade and there is no need for the claimant to demonstrate a *specific* effect on her situation. In relation to trading rules causation is presumed and does not need to be proven. On the other hand, in relation to non-trading rules a potential and undemonstrated effect is not enough: the trader must establish causation to bring her situation within the scope of the Treaty.[82]

This said, the rationale behind rules excluded pursuant to the application of the *Keck* presumptions and rules excluded because of the remoteness doctrine is the same: both rules do not have an effect on intra-Community trade relevant for the application of the Treaty. It seems therefore that *Keck* is less revolutionary than it might have appeared at first sight and the rigidity of the *Keck* formula is only apparent: what matters at the end is still whether the rules under scrutiny create a barrier to intra-Community trade. If they do not, they will benefit from the *Keck* exception; but if they do they will be scrutinised either through a broad interpretation of discrimination; or by a limitation of the scope of *Keck* itself.

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[81] Case C-317/92 *Commission v Germany* (expiry dates) [1994] ECR I-2039; and to a certain extent Case C-217/99 *Commission v Belgium* (notification numbers) [2000] ECR I-10251.

[82] Seen from another perspective, it is difficult to envisage that the Commission would bring successful proceedings against a non-discriminatory non-trading rule (say a rule of procedure) without demonstrating a precise link between that rule and intra-Community trade.

VII The Outer Limits of the Free Movement of Persons[83]

The free movement of persons provisions catch, as well as directly and indirectly discriminatory rules, rules which hinder or discourage movement.[84] The notion of hindrance/discouragement is interpreted in a generous way;[85] and, the intra-Community element necessary to trigger the Treaty has been considerably relaxed.[86] However, notwithstanding this broad interpretation there appear to be *some* limit to the scope of the free movement of persons provisions. The doctrine of 'effect too uncertain and indirect' applies also to the free movement of persons; and in some other cases (notably tax cases, but also social security cases) the interpretation of the free movement provisions seems narrower and limited to an assessment of discrimination. We shall consider these situations in turn.

A The Doctrine of Effect too Uncertain and Indirect and the Ruling in *Deliège*

The rationale underpinning the doctrine of 'effect too uncertain and indirect' is the same regardless of the Treaty freedom invoked. As we have seen above, in order for

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[83] The doctrine of effect too uncertain and indirect applies also to the free movement of capital; see Case C-282/04 *Commission v Netherlands* (Golden Shares) [2006] ECR I-9141, para 29.

[84] For example Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*[1995] ECR I-4165

[85] For example Case C-60/00 *Carpenter v Secretary of State for the Home Department* (n 3).

[86] For example Case C-35/00 *Freskot* [2003] ECR I-5263.

the doctrine to apply the rules must be non-discriminatory; must not be intended to regulate intra-Community movement or the conditions for the exercise of the relevant Treaty freedom; and there must be no causal connection between the rule and the alleged barrier. Thus, for instance, in the above mentioned ruling of *Semeraro Casa Uno*,[87] the Court found that Sunday trading rules fell outside the scope of Article 43 EC since they applied in the same manner to all relevant traders; their purpose was not to regulate conditions concerning establishment; and their effect on freedom of establishment was too uncertain and indirect to be capable of hindering the Treaty freedom. Similarly, in *Graf* the Court found that in order for non-discriminatory rules to fall within the scope of Article 39 EC, an effect on access to the labour market was necessary.[88] On the facts, that was not the case since the effect of the rules under consideration on free movement depended on a 'future and hypothetical event' and was therefore too uncertain and indirect to fall within the scope of the Treaty. And, in *Coname*,[89] the Court indicated that a very modest economic interest in relation to a public contract might render Articles 49 and 43 EC inapplicable because undertakings located in other municipalities would have no interest in the contract at issue and therefore the effect of the situation on the Treaty freedoms would be too uncertain and indirect. The ruling in *Coname* is not as straightforward as it might appear since lack of transparency in the award of public contracts is considered to be indirectly

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[87] Joined Cases C-418/93 etc *Semeraro Casa Uno et al* [1996] ECR I-2975, para 32.

[88] *V Graf v Filzmoser Maschinenbau GmbH*(n 23); the *Graf* ruling is probably the clearer indication to date concerning the scope of the free movement of workers, in that it clarifies that a non-discriminatory barrier, which does not have a specific effect on cross-border movement, is caught only insofar as it has an effect on market access.

[89] Case C-231/03 *Coname* [2005] ECR I-7287.

discriminatory;[90] however, in theory indirectly discriminatory rules should not benefit form the 'effect to uncertain and indirect' doctrine. Should one not want to dismiss the reference to the remoteness doctrine as a non-conclusive obiter (in the case at issue the economic value of the contract was sufficiently high to trigger the Treaty), then the ruling might indicate the convergence of the 'effect too uncertain and indirect' doctrine into a *de minimis* assessment which however would sit at odds with the ruling in *TK-Heimdienst*, where out-of-state traders would also have had little if any interest in selling groceries door-to-door.

In any event, it should be noted that the doctrine of effect 'too uncertain and indirect' has been applied more seldom in the field of persons, and indeed it is open to debate as to whether it is of any real significance. In particular, it could be queried whether the standard of proof required in order to be able to challenge rules that do not regulate intra-Community movement or the conditions for the exercise of the relevant freedom is any higher than that required to challenge rules regulating movement. Here, consider that in the case of natural persons the factors that might deter movement might not necessarily be linked to the conditions on the exercise of an economic activity. Thus, for instance, the rights of family members might be much more important to the migrant citizen than the need to fulfil an administrative requirement in order to pursue an economic activity. It is not surprising therefore that in these cases there seems no need to prove causation, either because it is given for granted; or simply because the scope of the Treaty free movement of persons provisions is broader.

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[90] See also Case C-458/03 *Parking Brixen* [2005] ECR I-8612.

The other proviso that might exclude the application of the free movement of persons provisions is the '*Deliège* exception';[91] in that case the Court excluded the applicability of Article 49 EC to rules governing the selection of athletes for international tournaments on the grounds that, even though those rules naturally determined a limitation in the number of participants, such a limitation was inherent in the conduct of international high-level sporting events. It is unclear whether the ruling is of relevance beyond the realm of sporting activities and to the author's knowledge it has not been applied again.[92] One could imagine however that a similar reasoning could be used to exclude the application of the free movement of persons provisions in relation to non-discriminatory taxation, to which we shall now turn.

B Non-discriminatory Taxation: A *Keck*-style or a *Deliège*-style Exception?

Article 90 EC prohibits discriminatory and protectionist taxation of foreign goods; otherwise it is for the Member States to decide on the level of taxation of goods

[91] Joined Cases C-51/96 and C-191/97 *C Deliège v Ligue Francophone de Judo et Disciplines Associées ASBL et al* [2000] ECR I-2549.

[92] Although it could be argued that the reasoning in *Deliège* is reminiscent of pre-*Keck* case law on rules the effect of which did not exceed the effects *intrinsic* in trade rules; eg Case 75/81 *JHT Blegsen v Belgium* [1982] ECR 1211

within their territory with the possible (and so far theoretical) exception of taxation which is so high as to impede the free movement of goods.[93]

In relation to the free movement of persons there is no provision equivalent to Article 90 EC; for this reason, discriminatory/protectionist taxation falls squarely within the scope of the Treaty free movement provisions. While this fact did not give rise to any problem when the scope of those provisions was limited to a prohibition on discrimination, the matter changed slightly once the Court decided to broaden the scope of the Treaty so as to include all rules which hindered or discouraged movement. It is obvious that high taxation might create a deterrent to movement; and yet, it is also obvious that the decision as to the level of taxation is, by its very nature, a political choice (possibly the 'most' political choice) and that therefore it should not be subject to the proportionality assessment by the Court of Justice.[94] It is therefore not surprising that overall the Court has not engaged in the review of the level of taxation and, indeed, it has made clear that the rights granted by the Treaty do not entail the guarantee that movement will be neutral from a fiscal viewpoint.[95] Rather, the bulk of the case law relating to taxation has focused on the discriminatory effect

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[93] Case C-383/01 *De Danske Billimportører* [2003] ECR I-6065, para 40; the Court clarified that the non applicability of Art 90 EC on discriminatory taxation, does not automatically trigger Art 28 EC, see Joined Cases C-34/01 to C-38/01 *Enirisorse Spa* [2003] ECR I-14243.

[94] See also S Kingston, 'The Boundaries of Sovereignty: the ECJ's Controversial Role Applying Internal Market Law to Direct Tax Measures' (2006–7) 9 *Cambridge Yearbook of European Legal Studies*, 287; and C Barnard 'European Union Law' (2007) *All England Annual Review*, 2008, Lexis Nexis , 179; J Snell, 'Non-discriminatory tax obstacles in Community law' (2007) 56 *ICLQ* 339.

[95] Case C-365/02 *Lindorfs* [2004] ECR I-7183, para 34 and see also Case C-403/03 *Schempp* [2005] ECR I-6421. Those cases were decided in relation to Art 18 EC (Union citizenship), but exactly the same approach has been adopted in relation to Art 39 EC in Case C-387/01 *Weigel* [2004] ECR I-9445, para 55.

of the rules governing the way taxation is levied, especially in relation to corporate entities.[96] However, in relation to Article 49 EC, the Court maintains a more ambiguous position which is slightly at odds with what said above. In *De Coster*,[97] the Court qualified a heavy tax on TV satellite dishes as a non-discriminatory obstacle to the free movement of services, thus suggesting that tax rules might be caught by the Treaty regardless of discrimination, and similar dicta can be found in the later cases of *Viacom Outdoor II* and *Mobistar*.[98]

This said, it is open to debate as to whether this case law is indicative of a change of approach: in *De Coster* the Court did in any event assess the discriminatory effects of the tax in question by pointing out that the tax affected non-domestic broadcasters more than domestic ones, since the latter had unlimited access to the cable network, while the former necessarily had to rely on satellite transmission. In

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[96] This is not to say that such case law is not problematic: tax rules are inherently territorial and therefore almost always entail a difference in treatment between residents and non-residents. Thus, a careful assessment of comparability is necessary to ascertain whether the situation of the resident and non-resident are comparable before proceeding to a finding of indirect discrimination and an assessment of the justifications. However, in several rulings the Court has given comparability for granted therefore proceeding directly to the justifications stage; see J Snell, 'Non-discriminatory tax obstacles in Community law' (2007) 56 *ICLQ* 339, at 349 and ff; for a slightly different perspective see S Kingston, 'The Boundaries of Sovereignty: the ECJ's Controversial Role Applying Internal Market Law to Direct Tax Measures' (2006–7) 9 *Cambridge Yearbook of European Legal Studies*, 287; and C Barnard 'European Union Law' (2007) *All England Annual Review*, 2008, Lexis Nexis , 179; Kingston and Barnard point out that a more thorough approach to comparability might be emerging; see, eg Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation v Commissioners of Inland Revenue* [2006] ECR I-11673, especially para 46.

[97] Case C-17/00 *De Coster* [2001] ECR I-9445; and see also Case C-43/97 *Sandoz* [1999] ECR I-7041 where the very existence of a tax has been defined as an obstacle to the free movement of capital (albeit justified for the part that was not discriminatory) [2005] ECR I-1167.

[98] Case C-134/00 *Viacom Outdoor Srl II* [2005] ECR I-1167, para 36; Joined Cases C-544 and C-545/03 *Mobistar* [2005] ECR I-7723, para 28.

Viacom Outdoor II the Court held that a tax on billboard advertising was not caught by Article 49 EC since it was non-discriminatory and its amount was fixed at a level to be considered modest in relation to the value of the services provided. In *Mobistar*, the Court excluded that a non-discriminatory tax on masts and pylon could fall within the scope of the Treaty free movement of services provisions if its only effect was to increase the cost of the service in question.[99] Indeed, some authors have argued that *Viacom Outdoor II* and *Mobistar,* far from supporting the view of an expansion of the scope of Article 49 EC in the field of non-discriminatory taxation, might signal a retreat so that a more general *Keck*-style exception is being introduced in relation to the free movement of persons.[100] While the present author is not so optimistic about the effect of this case law, it is argued that, despite the general dicta of the Court as to the fact that non-discriminatory taxation might be caught by the Treaty provisions on the free movement of services,[101] taxation de facto if not de jure falls within the scope of the Treaty only in so far as it is directly or indirectly discriminatory. Furthermore, the same can be said in relation to social security rules where, with a few exceptions, the level of social security contribution will not be scrutinised unless there is evidence of discrimination on grounds of nationality or movement.[102]

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[99] Joined Cases C-544 and C-545/03 *Mobistar* [2005] ECR I-7723, especially para 31.

[100] See J Meulman and H de Waele, 'A Retreat from Säger? Servicing or Fine-Tuning the Application of Article 49 EC' (2006) 33 *Legal Issues of Economic Integration* 207.

[101] As mentioned above there is the theoretical possibility that if taxation is fixed at such a high level so as to act as a total barrier to the Treaty freedoms it might come under the Court's scrutiny; see n 92 above.

[102] See, eg Case C-18/95 *Terhoeve* [1999] ECR I-345; the extent to which social security rules can be applied to migrant workers depends on whether the worker gains an advantage from affiliation to the social security scheme. When that is not the case the rules are considered indirectly discriminatory.

If that is the case, there are two possible explanations which could provide a justification for the exclusion of certain rules from the scope of the free movement of persons provisions.[103] First, it could be argued that this case law introduces a Keck-style exception.[104] Thus if, in the traditional reading of *Keck*, the latter excludes a certain type of rules (selling arrangements) from the scope of Article 28 EC unless discrimination can be proven or inferred from the rules under scrutiny, a similar rationale might apply to tax rules in the context of the free movement of persons. A policy decision has been made so as to disregard the possible effect on intra-Community movement of tax rules in so far as they determine, in a non-discriminatory way, the level of taxation. Since it is for the Member State to decide upon the level of taxation, the Court is not willing to syndicate that choice and therefore excludes such rules from the scope of the Treaty unless discrimination can be proven.

Secondly, it could be argued that the more confined application of the Treaty free movement provisions is justified by a *Deliège* line of reasoning. In this respect,

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[103] I have argued elsewhere that if the free movement provisions are understood as granting a right to exercise an economic activity in another Member State then the exclusion of non-discriminatory tax rules from their scope is entirely consistent since non-discriminatory tax rules do not have an effect on the right to exercise an economic activity (albeit they might have an effect on the willingness to do so because of their effect on profit margins); see E Spaventa, *Free Movement of Persons in the European Union—Barriers to Movement in their Constitutional Context* (Amsterdam, Kluwer Law International, 2007).

[104] Some authors have explored the desirability of a more general *Keck*-style exemption, ie not only in relation to tax rules; eg WH Roth, 'The European Court of Justice's Case Law on Freedom to Provide Services: Is *Keck* Relevant?' and JL Da Cruiz Villaça 'On the Application of *Keck* in the Fielf of Free Provision of Services' both in M Andenas and WH Roth (eds) *Services and Free Movement in EU Law* (Oxford, Oxford University Press, 2002); J Meulman and H de Waele, 'A Retreat from Säger? Servicing or Fine-Tuning the Application of Article 49 EC' (2006) 33 *Legal Issues of Economic Integration* 207.

tax rules, by definition, have an impact on the profitability of business; and such an impact is inherent in the very nature of tax rules which are aimed at imposing charges on economic operators to finance public expenditure. In the same way as it is unconceivable to have international tournaments without having rules governing the selection of participants to such competitions, it is unconceivable to have taxation which would not determine expenditure on those who are subject to it. Thus, those rules cannot be considered as a barrier because their effect on intra-Community movement is *inherent* in their aim, an aim which is a priori compatible with Community law.

The *Déliège* line of reasoning differs then from the *Keck*-style reasoning. The latter is a policy decision: tax rules are barriers to intra-Community movement but they are best left to the Member States. The *Déliège* line of reasoning, on the other hand, is conceptual: when the alleged barrier coincides with the very purpose of the rules—be it selecting athletes, or raising funds for the public purse—then, provided the aim in itself is legitimate, any effect that the rule might have on movement is inherent in the rules at issue and therefore cannot be scrutinised. The *Keck*-style reasoning leaves it open for the Court to change its policy; the *Déliège* reasoning defines the boundaries of the free movement provisions and acknowledges that facing a disadvantage, a loss in profit, is not enough to claim that a barrier to intra-Community movement was raised.

VIII Conclusions

The co-existence of different strands of case law, together with the use of different hermeneutic tools in relation to the same provisions, makes it extremely difficult to identify clear boundaries for the Treaty free movement provisions. Indeed, when the cases are closely scrutinised one might be excused for feeling a slight sense of desperation as to the chaotic picture arising from the Court's jurisprudence. The number of variables influencing the outcome of a case, as well as reasoning which is at times erratic, makes the scholar's job all the more difficult. In this respect, one should accept that it will never be possible to provide an umbrella under which *all* cases can sit comfortably. Furthermore, one should always be aware that the rationale underpinning the interpretation of the free movement provisions is fluid: it evolves as our perception of the problems and aims of the internal market changes with time. This is particularly visible in relation to the free movement of goods. In this respect, it should never be forgotten that the *Keck* ruling was a reaction to a specific problem—that of an excessively broad interpretation of Article 28 EC.

It is, therefore, not surprising that in the aftermath of the *Keck* ruling the main hermeneutic effort was directed at providing a clearer demarcation of the Treaty, so as to relocate the balancing exercise inherent in the proportionality assessment demanded by the mandatory requirements doctrine in the hands of national regulators. The mechanical application of *Keck* can then be properly understood as a policy decision aimed at correcting the imbalances created by the *Sunday trading* interpretation. However, with time, the application of *Keck* becomes more nuanced and the focus seems to shift back to the assessment of the effect on intra-Community trade of the rules under scrutiny. In this way, the rigid system of presumptions which characterised the *Keck* ruling evolves into a flexible system of presumptions which is still useful but not conclusive. Indeed, it could be noted that should one leave aside

the *Sunday trading* incident, the pre-*Keck* case law and the post-*Keck* case law are strikingly similar.

In relation to the free movement of persons, and contrary to expectations, it is easier to identify the outer boundaries. Thus, the broader interpretation given to those provisions, as controversial as this might be, gives rise to a jurisprudence which is more internally consistent. The applicability of the Treaty freedoms is excluded only in relation to a handful of situations where it is impossible to establish a causal effect between rule and alleged barrier. And, in cases where the effect of the rule complained about, an effect which is a priori deemed legitimate in the Community system, is inherent in the very aim that the rule seeks to pursue. Taxes inherently inconvenience tax payers: it would be foolhardy to interpret such an inconvenience as a barrier to movement.